



FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

Case #: HMO - 203612

PRELIMINARY RECITALS

Pursuant to a petition filed on November 3, 2021, under Wis. Stat. § 49.45(5)(a), and Wis. Admin. Code § HA 3.03, to review a decision by the Division of Medicaid Services regarding Medical Assistance (MA), a hearing was held on January 12, 2022, by telephone. A hearing scheduled for December 22, 2022, was rescheduled with the consent of the petitioner in order for his exhibits to be forwarded to the HMO and Department for review and consideration.

The issue for determination is whether the HMO/Department correctly denied a request for authorization of bariatric surgery, specifically, a Laparoscopic Sleeve Gastrectomy.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703

By: Representatives of Quartz HMO and written submission of Dr. Steven Tyska
Division of Medicaid Services
PO Box 309
Madison, WI 53701-0309

ADMINISTRATIVE LAW JUDGE:

Jason M. Grace
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES #) is a 62-year old resident of Dane County. He receives BadgerCare Plus benefits through Quartz HMO.
2. On or about September 7, 2021, a request for Laparoscopic Sleeve Gastrectomy was sent to Quartz by petitioner's medical provider. Per a medical office visit with Dr. Robert Golden on January 27, 2021, petitioner was [REDACTED], [REDACTED], and had a BMI of [REDACTED]. Exhibit 6.
3. By letter dated September 8, 2021, Quartz denied the request on grounds that he did not meet Forward Health criteria for coverage of bariatric surgery. Specifically, that coverage criteria for an individual with a body mass index (BMI) of greater than 35 and less than 40 required the individual have inadequately controlled Type 2 diabetes mellitus. Petitioner did not have Type 2 diabetes. Exhibit 3.
4. Petitioner filed an appeal with the HMO. Exhibit 3.
5. On October 26, 2021, Quartz held a meeting to review petitioner's appeal. By letter dated October 27, 2021, Quartz's Grievance and Appeal Committee upheld the denial. Exhibit 3.
6. Petitioner timely filed an appeal with the Division of Hearings and Appeals.
7. The Department, by Dr. Steven Tyska, reviewed the HMO's decision to deny petitioner's request for bariatric surgery. In a letter dated December 1, 2021, he provided the following explanation for upholding the HMO's denial:

... the submitted records do not include documentation of allowable co-morbid condition/s associated with a documented BMI. Specifically, when the member's BMI was between 35.0 and 40.0, there is no documentation the member had a diagnosis of Type 2 diabetes mellitus; when the member's BMI was greater than 40.0 but less than 50.0, there is no documentation of moderate to severe obstructive sleep apnea [the submitted records do not include a diagnostic sleep study report], Type 2 diabetes mellitus, obesity-related cardiomyopathy or Pickwickian syndrome [obesity hypoventilation syndrome]. The only possible criterion is medically refractory hypertension which published policy defines as 'blood pressure consistently greater than 140/90 mmHg despite the concurrent use of three anti-hypertensive agents of different drug classes'. The clinical record dated 10/18/2021 documents the use of 3 anti-hypertensive medication of 3 different classes; however, the member's blood pressure was 138/86 [below the required 140/90]. Based on the submitted documentation and in consideration of ForwardHealth's published policy for prior authorization for bariatric surgery, ForwardHealth upholds the HMO's denial of CPT 43775, laparoscopic sleeve gastrectomy bariatric surgery.

Exhibit 1.

8. Based on measurements obtained during in-person medical visits, petitioner's height, weight, and BMI were reported as follows:
 - 9/8/21: [REDACTED]
 - 9/17/21: [REDACTED]
 - 9/23/21: no height listed, [REDACTED]
 - 10/18/21: [REDACTED]
 - 11/12/21: [REDACTED]

- 12/15/21: no height listed, [REDACTED], no BMI listed.
- 1/10/22: no height listed, [REDACTED]

Exhibits 6 and 8.

9. A sleep study signed by Dr. David Plante on January 5, 2022, indicates that petitioner has obstructive sleep apnea—moderate to severe. Exhibit 8.

DISCUSSION

Under the discretion allowed by Wis. Stat. §49.45(9), the Department of Health Services (“the department”) requires certain Medical Assistance (MA) recipients to participate in HMOs. Wis. Admin. Code §DHS 104.05(2)(a). An MA recipient enrolled in an HMO must receive MA services from the HMO’s providers, except for referrals or emergencies. See Wis. Admin. Code §DHS 104.05(3). HMOs must provide the same services as those provided to persons enrolled in fee for service MA or BadgerCare Plus. Wis. Admin. Code §DHS 104.05(3).

The petitioner requested prior authorization for bariatric surgery. To obtain this service he must show the surgery is medically necessary. A service is medically necessary if it is “[r]equired to prevent, identify or treat a recipient’s illness, injury or disability...” Wis. Admin. Code § DHS 101.03(96m). To help determine whether bariatric surgery is medically necessary, the Department has issued guidelines found in FowardHealth Update, Topic 12177. Those guidelines provide the following:

All [covered bariatric surgery procedures](#) require PA (prior authorization). A bariatric procedure that does not meet the following PA approval criteria is considered a noncovered service.

Prior Authorization Approval Criteria for Bariatric Surgery

PA requests for bariatric surgery may be approved if **one** of the following criteria is met:

- The member has a BMI (body mass index) greater than or equal to 35 kg/m² and inadequately controlled Type 2 diabetes mellitus despite appropriate therapy with at least two medications of different drug classes, either oral or injectable.
- The member has a BMI greater than or equal to 40 kg/m² and **one** of the following:
 - Moderate to severe obstructive sleep apnea
 - Type 2 diabetes mellitus
 - Medically refractory hypertension (blood pressure consistently greater than 140/90 mmHg despite the concurrent use of three anti-hypertensive agents of different drug classes)

- Obesity-related cardiomyopathy
- Pickwickian syndrome (obesity hypoventilation syndrome)
- The member has a BMI greater than or equal to 50 kg/m² and mechanical arthropathy with documented functional impairment by a licensed physical therapist.

In addition to one of the above criteria, the member is required to meet **all** of the following criteria:

- The member is 18 years of age or older.
- The member has been obese for at least five years.
- Adequate prior attempts to lose weight or maintain weight loss have failed, **or**, for members whose prior attempts at weight loss have been deemed absent or inadequate, a six-month medically supervised weight loss program has been undertaken.

Note: An acceptable medically supervised weight loss program is weight loss guidance that is provided in a clinical setting by a licensed healthcare professional on repeated occasions over at least a six-month period.

These required weight loss attempts by the member are prior to and separate from the bariatric assessment and six-month multi-disciplinary surgical preparatory regimen described below.

- The member has been determined to be an appropriate surgical candidate based on an evaluation by the PCP (primary care provider) or other appropriate provider (that is, the member does not have cardiopulmonary disease that would make surgical risk prohibitive or other identifiable contraindication to elective surgery).
- The member has abstained from alcohol abuse and other substance abuse for at least six months.
- The member has undergone a multidisciplinary bariatric team assessment within 12 months of the proposed surgery and has been found by consensus to be an appropriate surgical candidate, and there is documentation that supports that the member understands risks, benefits, expected outcomes,

alternatives, and required lifestyle changes. The bariatric assessment, at a minimum, must include the following:

- The member's medical history, physical exam results, and proposed plan by the bariatric surgeon
- A psychological or psychiatric evaluation to determine readiness for surgery and identify any mental health barriers to the success of the proposed surgery. If a comorbid psychiatric diagnosis exists, an assessment of adequate stability must come from the treating mental health provider.
- At least six consecutive months of documented participation and progress in a multi-disciplinary surgical preparatory regimen that includes dietary counselling, supervised exercise, and behavior modification to assess the member's ability to comply with the necessary post-operative lifestyle changes and to signal surgical readiness. Records must document member compliance with this multidisciplinary surgical preparatory regimen. Accordingly, the member must not have a net weight gain during this period greater than what is explainable as a normal fluctuation (up to five pounds) or otherwise attributable to a recognized medical condition (such as edema). If applicable, members should be strongly encouraged to stop smoking preoperatively.
- The member has been evaluated for and does not have a contributing endocrinopathy.

Note: Bariatric surgery is not required to be performed at an American Society for Metabolic and Bariatric Surgery-certified Center of Excellence or Level 1 Bariatric Surgery Center; however, it is required to be performed in high-volume centers with multidisciplinary teams that understand and are experienced in the management of metabolic surgery and obesity-related comorbidities such as diabetes.

Prior Authorization Approval Criteria for Revision of Bariatric Surgery

PA requests for revision of bariatric surgery may be approved if **one** of the following criteria is met:

- Removal of a gastric band is considered medically necessary and is recommended by the member's physician.
- Surgery to correct complications of a prior bariatric surgery is considered medically necessary for such issues as obstruction, stricture, erosion, band slippage, or port or tubing malfunction.

Note: Revision of a primary bariatric surgery procedure that has failed (that is, surgery was initially successful at inducing weight loss, then the member regained weight) due to dilation of the gastric pouch, a dilated gastrojejunal stoma, or dilatation of the gastrojejunostomy anastomosis is not covered if, as in most cases of dilation, the primary cause for these remote post-surgical changes is noncompliance (that is, overeating).

...

Prior Authorization Documentation

When requesting PA for bariatric surgery, revision of bariatric surgery, or repeat bariatric surgery, providers are required to submit all of the following:

- A completed [PA/RF \(Prior Authorization Request Form, F-11018 \(05/2013\)\)](#)
- A completed [PA/PA \(Prior Authorization/Physician Attachment, F-11016 \(07/2012\)\)](#)
- Documentation that fully supports the approval criteria

Length of Authorization

The length of authorization for an approved PA request for bariatric surgery, revision of bariatric surgery, or repeat bariatric surgery is 12 months.

FowardHealth Topic #12177, found online at <https://www.forwardhealth.wi.gov/WIPortal/Subsystem/KW/Print.aspx?ia=1&p=1&sa=50&s=3&c=11&nt=Bariatric+Surgery>

The Division of Hearings and Appeals (DHA) does not have the authority to modify or amend the guidelines established in FowardHealth Update, Topic 12177, for MA coverage of bariatric surgery. Moreover, it is the long-standing policy of the DHA that its administrative law judges do not possess equitable powers. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977. This office must limit its review to the law as set forth in statutes, regulations, and administrative code provisions.

A patient's BMI is critical to determining the co-morbid medical condition(s) that must be present in order to meet MA coverage criteria for bariatric surgery. In this case, petitioner has not consistently had a

BMI of 40.0 or greater. His medical records documenting three in-office medical visits that occurred in September 2021 (as opposed to self-reported weights at telemedicine appointments) set forth BMIs of [REDACTED], [REDACTED], and [REDACTED]. See, Finding of Fact 7. Records from in-office visits on October 18, 2021, and November 12, 2021, do note BMIs of [REDACTED] and [REDACTED], respectively. However, it was calculated using a height for petitioner of 5 feet 9 inches. The HMO's medical doctor persuasively argued that the most reliable measurement of his height occurred at an office visit on September 17, 2021. His height was measured as [REDACTED] inches at that appointment. Petitioner did not dispute that measurement during his testimony. As such, the BMI results of over 40 noted above are not accurate. Furthermore, his most BMI was determined at an in-office medical visit on January 10, 2022, wherein it was noted he weighed [REDACTED] lbs. and had a BMI of [REDACTED].

Based on the record, I find that petitioner's BMI is above 35 but less than 40. When the BMI falls within this range, an individual must have inadequately controlled Type 2 diabetes mellitus to meet MA coverage criteria for bariatric surgery. Petitioner does not have Type 2 diabetes mellitus. As such, I must uphold the HMO/Department's denial of the PA request.

Finally, it is clear that petitioner's medical condition is fluid and his BMI is nearly 40. I note that if his condition changes, he is able to update his request for bariatric surgery with the HMO or submit a new PA request, with medical documentation provided in support. It is advisable that changes in factors such as weight, height, BMI, etc., be clearly indicated in that documentation by his medical provider, with information sufficient to demonstrate its accuracy.

CONCLUSIONS OF LAW

The Department/HMO correctly denied petitioner's September 7, 2021, request for authorization of bariatric surgery, specifically, a Laparoscopic Sleeve Gastrectomy.

THEREFORE, it is

ORDERED

That petitioner's appeal is dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 4822 Madison Yards Way, 5th Floor North, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of

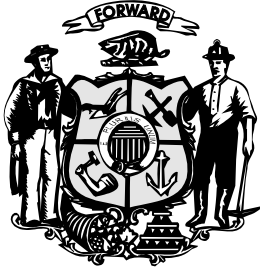
Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 14th day of January, 2022


s

Jason M. Grace
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
5th Floor North
4822 Madison Yards Way
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on January 14, 2022.

Division of Medicaid Services